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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

MARK WARD,

Plaintiff and Appellant,

v.

LOS ANGELES COUNTY  
PROBATION DEPARTMENT  
et al.,

Defendants and  
Respondents.

B286339

(Los Angeles County  
Super. Ct. No. BC619972)

APPEAL from a judgment of the Los Angeles County  
Superior Court, Malcolm H. Mackey, Judge. Reversed.

Law Offices of Akudinobi & Ikonte and Emmanuel C.  
Akudinobi for Plaintiff and Appellant.

Hurrell Cantrall, Thomas C. Hurrell and Melinda Cantrall  
for Defendants and Respondents.

## INTRODUCTION

Plaintiff Mark Ward, a probation officer with the Los Angeles County Probation Department, brought an action alleging employment discrimination and related claims against the Probation Department and three of his supervisors (collectively, Defendants). During the litigation, Ward's counsel Emmanuel Akudinobi became unavailable for a period of time because of a family emergency—his wife was terminally ill with cancer, and he was her primary caretaker. After Defendants moved for summary judgment, the parties agreed to a 90-day continuance of previously set dates (including the summary judgment hearing) in light of counsel's family situation and his resulting inability to complete discovery related to the summary judgment motion.

When Ward moved ex parte for approval of the stipulation, the trial court was not available. Another judicial officer handling the court's ex parte calendar granted a significantly shorter continuance of only the summary judgment hearing, with the understanding the parties would follow up with the trial court when it returned about the possibility of a further continuance of the summary judgment schedule as well as other control dates.

Akudinobi did not revisit the continuance request, however, until approximately one month later in connection with filing his opposition to summary judgment. The trial court denied the request for additional time. Two weeks later, at the summary judgment hearing, Akudinobi again requested additional time, and the request was again denied. The trial court then proceeded to grant summary judgment in Defendants' favor. While

Akudinobi's diligence in seeking a continuance was less than ideal, given his personal situation it was also more than understandable. As the denial of the stipulated continuance suggests this case was unnecessarily decided on something other than its merits, we reverse.

### **BACKGROUND**

Ward filed suit on May 10, 2016. In September 2016, a case management conference was held and trial set for October 2, 2017. Both parties served written discovery, and depositions commenced.

On April 6, 2017, during the first day of Ward's deposition, Akudinobi informed defense counsel on the record that he had a family emergency that would make it impossible to complete the deposition on the following day as originally planned. While the nature of the family emergency does not appear to have been detailed at this point in time, Akudinobi's spouse had been battling breast cancer and was advised in January 2017 her current treatment was no longer effective. Akudinobi's family emergency involved assisting his spouse with an appointment related to experimental treatment. On April 11, 2017, Akudinobi informed defense counsel he would be out of the office "for the rest of this week and possibly beyond. . . . [¶] I will advise in the near future when I will be available." (*Italics omitted.*) Approximately one week later, Akudinobi learned the cancer had spread to his wife's brain.

On May 2, 2017, the court held a hearing on Defendants' motions to compel further responses to interrogatories and document production requests. Ward's counsel did not file any opposition to the motions, but Akudinobi's law partner appeared

at the hearing. The trial court granted the motions to compel, ordered Ward to serve further responses within 30 days, and imposed sanctions against Ward and his counsel of \$3,500.

On May 11, 2017, Defendants filed a motion for summary judgment. The hearing on the motion was initially set for July 28, 2017 but was sua sponte continued by the trial court to August 16, 2017. On June 16, 2017, Ward's counsel advised Defendants that he was still faced with a family emergency and was not able to return to active law practice. He accordingly requested "the parties stipulate to continue the trial date and by extension, the summary judgment hearing date to enable discovery to be completed and for the case to be heard on the merits." During the discussions, Akudinobi explained his wife was terminally ill and he was her primary caregiver. Defense counsel did not indicate an objection, but reasonably responded that to consider the request they needed a proposed timeline for key case management dates, including when Ward would produce the court-ordered responses to discovery and pay the sanctions award that was still outstanding.

The record does not indicate that either Akudinobi or his law partner responded punctually to this request from defense counsel. By July 28, 2017, however, the parties had agreed to continue all dates, including the summary judgment hearing, by 90 days. Ward thereafter moved ex parte for a continuance based on the parties' stipulation. As the trial court was dark, the hearing was held before a different judicial officer. During the hearing, Akudinobi explained his wife's medical situation. The judicial officer continued the summary judgment hearing to September 13, 2017 but did not continue any other dates. Although it does not appear in the notice of ruling, both parties

agree the judicial officer covering for the trial court made an interim order and suggested Ward's counsel follow up with the trial court when it returned regarding a further continuance.

On August 14, 2017, defense counsel wrote Ward's counsel regarding the July 31, 2017 hearing. Defense counsel noted their understanding had been Ward would promptly move for the remaining stipulated-to continuance, but Ward had not yet followed up with the trial court. Counsel asked if Ward still intended to seek a continuance, and again asked about outstanding discovery, payment of sanctions, and other issues which Ward's counsel still had not addressed. On August 15, 2017, Ward's counsel replied by requesting the parties discuss dates to complete depositions of Ward, two of the individual defendants, and four nonparties who submitted declarations in support of Defendants' motion for summary judgment. Defense counsel responded that same day. After expressing sympathy and best wishes for Akudinobi and his wife, counsel inquired about coordinating dates for the depositions, and reminding Akudinobi that Ward's discovery responses were still overdue and the sanctions ordered still unpaid.

On August 30, 2017 Ward filed his opposition to the motion for summary judgment and renewed his request to continue the hearing on the motion. Ward's counsel stated that he had been away from the office because of his wife's illness, and that absence had impacted his ability to conduct further discovery, respond to Defendants' discovery, and prepare for trial. Defendants conditionally opposed this continuance request. Defense counsel acknowledged a continuance would normally be reasonable but expressed concern about Akudinobi's history of unresponsiveness and delay, and failure to abide by prior court

orders. Defendants indicated they still agreed to any continuance that adhered to the original 90-day stipulation, meaning the summary judgment hearing would take place around mid-November 2017 and trial in early January 2018. Defendants opposed any delay beyond those dates, and further opposed any continuance of the discovery cut-off date.

On August 30, the trial court refused to grant any continuance of the existing dates. Ward's counsel raised the continuance request again at the September 13, 2017 summary judgment hearing. The trial court responded that it had already accommodated Ward's counsel through the two and one-half week sua sponte continuance of the hearing, and the additional four-week continuance granted on July 31, 2017 at Ward's request. Acknowledging analogous case law involving illnesses of attorneys themselves, the court noted a continuance would be appropriate unless counsel was dilatory. The trial court found no diligent discovery efforts within the most recent months, but rather delays and a failure to take the opportunity to substitute in different counsel. Given the lack of diligence, the court denied any further continuance and proceeded with the summary judgment hearing. After hearing argument, it granted summary judgment in Defendants' favor.

After judgment was entered, Ward filed a timely notice of appeal.

## **DISCUSSION**

### **A. Standard of Review**

Generally, there is no right to a continuance as a matter of law, and the power to determine when a continuance should be

granted is within the discretion of the court. (*Lerma v. County of Orange* (2004) 120 Cal.App.4th 709, 714 (*Lerma*).) We review the denial of such continuance requests for abuse of discretion. (*Hernandez v. Superior Court* (2004) 115 Cal.App.4th 1242, 1246 (*Hernandez*).) An exception to this discretion is created by Code of Civil Procedure section 437c, subdivision (h),<sup>1</sup> which mandates the court grant a continuance of a hearing on a motion for summary judgment when a party shows a continuance is needed to obtain facts essential to justify opposition to the motion. (*Knapp v. Doherty* (2004) 123 Cal.App.4th 76, 100–101; *Lerma, supra*, 120 Cal.App.4th at p. 714.)

**B. The Trial Court Did Not Err in Denying a Continuance Pursuant to Section 437c, subdivision (h)**

Section 437c, subdivision (h) provides: “If it appears from the affidavits submitted in opposition to a motion for summary judgment or summary adjudication, or both, that facts essential to justify opposition may exist but cannot, for reasons stated, be presented, the court shall deny the motion, order a continuance to permit affidavits to be obtained or discovery to be had, or make any other order as may be just. The application to continue the motion to obtain necessary discovery may also be made by ex parte motion at any time on or before the date the opposition response to the motion is due.” To make the required showing under this statute, “an opposing party’s declaration must show (1) the facts to be obtained are essential to opposing the motion, (2) there is reason to believe such facts may exist, and (3) the reasons why additional time is needed to obtain these facts.”

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<sup>1</sup> All statutory references are to the Code of Civil Procedure.

(*Chavez v. 24 Hour Fitness USA, Inc.* (2015) 238 Cal.App.4th 632, 643 (*Chavez*).)

The declaration submitted by Ward’s counsel in support of his continuance request did not satisfy these requirements. He generally averred depositions of defendants, declarants, and others would show that race was a factor in Ward being denied certain positions, and that Ward’s complaints about discrimination were the motivating reason for retaliation he suffered. In other words, counsel said nothing more than that he expected further depositions were likely to produce relevant evidence. Given the scope of discovery must be relevant to the subject matter of the pending action and reasonably calculated to lead to the discovery of admissible evidence (§ 2017.010), that was not saying much.

It is not sufficient for purposes of section 437c, subdivision (h) merely to indicate further discovery is contemplated. The statute requires the party requesting a continuance to demonstrate that facts essential to justify opposition to the summary judgment motion may exist. (*Jade Fashion & Co., Inc. v. Harkham Industries, Inc.* (2014) 229 Cal.App.4th 635, 656.) Conclusory statements like those submitted by Ward’s counsel here—which did not detail the specific facts showing the existence of controverting evidence—are insufficient. (*Id.*; *Lerma, supra*, 120 Cal.App.4th at pp. 715–716.)

**C. Ward Was Entitled to Continuance Given His Family Situation and the Strong Public Policy Favoring Disposition on the Merits**

Ward’s admitted failure to satisfy subdivision (h) does not end the inquiry, however. When a party cannot make the



showing required for mandatory continuance, a continuance may nevertheless be appropriate under the ordinary discretionary standard. (*Hamilton v. Orange County Sheriff's Department* (2017) 8 Cal.App.5th 759, 765 (*Hamilton*).) In addition to making a request under subdivision (h), Ward's continuance request encompassed this discretionary ground.

A continuance under the ordinary discretionary standard “requires a showing of good cause. [Citation.] ‘In deciding whether to continue a summary judgment to permit additional discovery courts consider various factors, including (1) how long the case has been pending; (2) how long the requesting party had to oppose the motion; (3) whether the continuance motion could have been made earlier; (4) the proximity of the trial date or the 30-day discovery cutoff before trial; (5) any prior continuances for the same reason; and (6) the question whether the evidence sought is truly essential to the motion.’” (*Hamilton, supra*, 8 Cal.App.5th at p. 765.) “Usually, the court's discretion should be exercised in favor of granting a continuance: ‘The interests at stake are too high to sanction the denial of a continuance without good reason.’” (*Denton v. City and County of San Francisco* (2017) 16 Cal.App.5th 779, 794.)

The trial court found no governing law on family medical emergencies, but citing *Lerma, supra*, 120 Cal.App.4th at p. 718 and *Hernandez, supra*, 115 Cal.App.4th at pp. 1247–1248, did note similar case law involving the illness of counsel. The court recognized that serious illnesses involving attorneys or parties are generally good cause for a continuance and given this analogous case law denying Akudinobi's continuance request “may be an abuse of discretion, where counsel was not dilatory and it is simply a case of human frailty.” The court found,

however, that Akudinobi was dilatory because there had been no diligent discovery efforts since April 2017, and no effort to substitute different counsel in Akudinobi's place.

In reviewing the court's exercise of discretion, we start from the same place as did the trial court—given the facts before the court, denying a continuance would be an abuse of discretion unless counsel was dilatory. The lack of diligent discovery efforts relied upon by the trial court to deny the continuance exceeded the bounds of reason because it placed Ward's counsel in an impossible Catch-22: Akudinobi requested a continuance because he was unable to continue prior discovery efforts given the medical emergency arising in April 2017, but was denied a continuance because of his failure to continue discovery efforts after the medical emergency arising in April 2017.<sup>2</sup> With regard

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<sup>2</sup> While the trial court focused on the lack of diligence in discovery since April 2017, we do note Akudinobi's failure to act more promptly in requesting a continuance and in responding to defense counsel's inquiries. The record also shows that prior to April 2017 Akudinobi failed to attend the case management conference, did not respond to deposition scheduling inquiries, and unilaterally took the deposition of defendant Garcia off calendar the day before it was to commence. These pre-April 2017 actions and failures to act, however, were not the basis on which the court found Akudinobi dilatory. Like the court in *Hamilton*, "[w]e recognize that plaintiff's counsel was not optimally diligent. He could have noticed depositions sooner . . . . He could have followed up with defense counsel earlier . . . . And he certainly could have better attended to the procedural details of obtaining a continuance." (8 Cal.App.5th at p. 766.) Comparatively speaking, however, this lack of diligence did not justify the substantial injustice the denial of a continuance created on Ward. (*Ibid.*)

to the lack of effort to substitute counsel, the parties agreed to a 90-day continuance, were granted approximately one third of that amount with regard to the summary judgment hearing, and then within a month thereafter denied a further continuance shortly before the summary judgment hearing. In those circumstances, it was not reasonable to expect Ward to substitute different counsel in place of Akudinobi.

As the *Chavez* court noted, “ “[j]udges are faced with opposing responsibilities when continuances for the hearing of summary judgment motions are sought. On the one hand, they are mandated by the Trial Court Delay Reduction Act [citation] to actively assume and maintain control over the pace of litigation. On the other hand, they must abide by the guiding principle of deciding cases on their merits rather than on procedural deficiencies. [Citation.] Such decisions must be made in an atmosphere of substantial justice. When[, as here,] the two policies collide head-on, the strong public policy favoring disposition on the merits outweighs the competing policy favoring judicial efficiency” ’ ’ ” (238 Cal.App.4th at p. 644; see also *Hernandez, supra*, 115 Cal.App.4th at p. 1246.)

Here, Ward’s counsel essentially made one request for a continuance—he was granted a portion of it, denied the remainder, and thereafter sought approval of the remainder of the extension previously agreed to by Defendants. His wife’s terminal illness and his role as primary caretaker was good cause for the request. The original request was not open-ended, but rather a reasonable one of 90 days. The discovery counsel sought was important to his opposition and the case generally—depositions of certain defendants, and individuals who submitted declarations in support of the summary judgment motion.

(*Hamilton*, supra, 8 Cal.App.5th at p. 765 [need to depose summary judgment declarants justified continuance despite plaintiff's failure to make showing required by section 437c, subdivision (h)].)

While the parties' "stipulation was, of course, not binding on the court, principles of encouraging civility . . . and disposing of cases on their merits counseled in favor of accepting it, absent some good reason for rejecting it." (*Hamilton*, supra, 8 Cal.App.5th at p. 765.) At time of the September 13, 2017 hearing, the case had been pending 15 months—beyond the 12-month goal in California Standard of Judicial Administration 2.2, subdivision (f)(1)(A), but with time still left if the court granted the remaining continuance to which the parties had originally agreed to meet the 18-month goal in subdivision (f)(1)(B). (*Hamilton* at p. 766 [noting abuse of discretion to deny stipulated continuance in similar circumstance].) Under these circumstances, it was error to deny any further continuance beyond the limited one granted on July 31, 2017.<sup>3</sup>

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<sup>3</sup> In light of our ruling on the continuance issue, we do not reach Plaintiff's challenges to the summary judgment ruling itself and express no opinion as to their merit or lack thereof.

## DISPOSITION

The judgment is reversed. The trial court is directed to vacate its order granting summary judgment, and to enter an appropriate scheduling order for completing discovery, hearing Defendants' summary judgment motion, and other case management dates. Ward is to recover his costs on appeal.

NOT TO BE PUBLISHED

WEINGART, J.\*

We concur:

JOHNSON, Acting P. J.

BENDIX, J.

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\* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.